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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Case No. 2:15-MD-02641-DGC

IN RE: Bard IVC Filters Products Liability
Litigation

**DEFENDANTS C. R. BARD INC. AND
BARD PERIPHERAL VASCULAR
INC.'S MOTION TO STRIKE DR.
MUEHRCKE'S UNTIMELY GENERIC
RECOVERY FILTER OPINIONS**

(Assigned to the Honorable David G.
Campbell)

(Tinlin Bellwether Case)

The Court ordered the plaintiffs to produce full and complete expert disclosures about common fact and expert issues in the MDL (exclusive of case-specific issues) no later than March 3, 2017. On December 7, 2018, however, the plaintiffs produced the report of Dr. Derek Muehrcke that contains previously undisclosed opinions about common issues concerning the Recovery Filter. These opinions should be stricken under

1 Rule 37(c)(1) for failure to comply with Case Management Order No. 8 (Doc. 519) and
 2 Rule 26(a)(2)(A)-(C).

3 BACKGROUND

4 On February 2, 2016, the Court entered Case Management Order No. 8 (Doc. 519),
 5 which set out the sequence of general fact and expert discovery in the MDL. The Court
 6 provided that “Plaintiffs shall provide full and complete expert disclosures as required by
 7 Rule 26(a)(2)(A)-(C) of the Federal Rules of Civil Procedure no later than **December 16,**
 8 **2016.**” (*Id.* at 2.) The Court further ordered that “As stated in the Advisory Committee
 9 Notes to Rule 26 (1993 Amendments), expert reports under Rule 26(a)(2)(B) must set
 10 forth ‘the testimony the witness is expected to present during direct examination, together
 11 with the reasons therefor.’ Full and complete disclosures of such testimony are required
 12 on the dates set forth above; absent extraordinary circumstances, parties will not be
 13 permitted to supplement expert reports after these dates.” (*Id.* at 3.)

14 On October 17, 2016, and at the plaintiffs’ request, the Court adjusted the
 15 discovery schedule in Case Management Order No. 18 (Doc. 3685) to allow expert
 16 disclosures to be produced no later than March 3, 2017. The Court further informed the
 17 parties that “expert disclosures on these dates must be full and complete as required by
 18 Rule 26(a)(2)(A)-(C)” (*Id.* at 3.) Pursuant to CMO 18, the plaintiffs produced expert
 19 reports on general matters (i.e., not case-specific issues) for numerous physician experts,
 20 including Drs. Thomas Kinney, Anne Roberts, Sanjeeva Kalva, David Kessler, and
 21 Suzanne Parisian. Each of these physicians dedicated large portions of their reports to
 22 opining about the Recovery Filter: Drs. Kinney, Roberts, and Kalva dedicated
 23 approximately 30 pages of their report to the Recovery Filter; Dr. Kessler dedicated
 24 approximately 100 pages of his report to the Recovery Filter; and Dr. Parisian dedicated
 25 approximately 115 pages of her report to the Recovery Filter.

26 On December 7, 2018—more than 1.5 years after the Court’s deadline in CMO
 27 18—the *Tinlin* plaintiffs produced an “Expert Disclosure for Debra Tinlin” by Dr.
 28

1 Muehrcke. In that report, Dr. Muehrcke includes a 5-page section at the end of the report,
 2 entitled “Bard Recovery Filter Specific Opinions” that contains newly disclosed generic
 3 opinions about the Recovery Filter. (Muehrcke *Tinlin* Expert Disclosure, at 11-15,
 4 attached as Exhibit A.) None of Dr. Muehrcke’s previous case-specific Rule 26 Reports
 5 for *Booker*, *Jones*, *Hyde*, *Mulkey*, or *Kruse* contained analogous sections for the filters at
 6 issue in those cases. (Muehrcke Reports. regarding *Booker*, *Jones*, *Hyde*, *Mulkey*, and
 7 *Kruse*, collectively attached as Exhibit B.)

8 **ARGUMENT AND CITATION OF AUTHORITY**

9 Dr. Muehrcke’s newly disclosed opinions should be stricken, and he should not be
 10 permitted to testify about opinions expressed in the “Bard Recovery Filter Specific
 11 Opinions” section of his *Tinlin* Rule 26 Report.

12 First, in CMO 8, the Court explicitly informed the parties that all generic opinions
 13 must be disclosed by December 16, 2016 (later amended to March 3, 2017), and that the
 14 parties would not be permitted to supplement expert reports absent extraordinary
 15 circumstances. No extraordinary circumstances exist here. None of the material that Dr.
 16 Mehrcke cites to support his general opinions about the Recovery filter was unavailable to
 17 him. In fact, it is cited by the doctors whose reports were timely served in March, 2017.
 18 Nothing prevented Dr. Muehrcke from offering his generic Recovery Filter opinions in
 19 March 2017. Thus, the plaintiffs should be precluded from offering Dr. Muehrcke’s
 20 clearly generic Recovery Filter opinions under the guise of a case-specific *Tinlin* Rule 26
 21 Report.

22 Second, Rule 37(c)(1) provides that a party’s failure to disclose information as
 23 required by Rule 26(a) precludes the party from using that information on a motion, at a
 24 hearing, or at trial unless the failure was substantially justified or is harmless. The Ninth
 25 Circuit has found that Rule 37(c)(1) “gives teeth to [Rule 26’s] requirements by
 26 forbidding the use at trial of any information at trial of any information required to be
 27 disclosed by Rule 26(a) that is not properly disclosed.” *Yeti by Molly, Ltd v. Deckers*
 28

1 *Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001). The Ninth Circuit further
2 acknowledged that Rule 37(c)(1)'s sanctions are "self-executing" and "automatic." to
3 "provide[] a strong inducement for disclosure of material" *Id.* (quoting Fed. R. Civ.
4 P. 27 Advisory Committee's Note (1993) and affirming exclusion of expert's opinion
5 even though no explicit court order had been violated and absent bad faith or willfulness).

6 Here, the plaintiffs have no substantial justification for failing to disclose Dr.
7 Muehrcke's generic Recovery Filter opinions in March 2017, as required under CMOs 8
8 and 18. Dr. Muehrcke could have disclosed his opinions about the Recovery Filter by the
9 March 2017 deadline, just as Drs. Kinney, Roberts, Kalva, Kessler, and Parisian disclosed
10 their lengthy opinions about the Recovery Filter in March 2017. As this Court found in
11 *Lemon v. Harlem Globetrotters Intern, Inc.*, Nos. CV 04-0299 PHX DGC, CV 04-1023
12 PHX DGC, 2006 WL 3499969, at **3-4 (D. Ariz. Dec. 5, 2006), failure to disclose expert
13 opinions within the time required by the case management orders and with a delay of over
14 one year is grounds for barring the opinions at trial when the opinions could have been
15 timely disclosed. Such is the case with Dr. Muehrcke's late-disclosed opinions.

16 Nor would allowing Dr. Muehrcke to present his opinions at trial be harmless.
17 Although Bard will cross examine Dr. Muehrcke about his new opinions at a deposition,¹
18 Bard cannot have its own experts offer rebuttal generic opinions about the Recovery Filter
19 without violating the same Case Management Orders that the plaintiffs violated. Because
20 the time for responding to generic opinions offered by the plaintiffs' experts has long
21 since passed, Bard cannot fully defend itself against Dr. Muehrcke's newly disclosed
22 generic opinions. Thus, the late disclosure is not harmless.²

24 ¹ Because the Court most likely will not issue an order on Bard's motion before Dr.
25 Muehrcke's deposition, which is scheduled for January 11, 2019, Bard will be forced to
26 question Dr. Muehrcke about his new opinions during the deposition to lessen its
27 prejudice if the Court denies Bard's motion. Bard's questioning of Dr. Muehrcke during
28 his deposition about the substance of his newly disclosed opinions, however, should not
have any bearing on Bard's motion.

² The Court should also note that, although not relevant to the Rule 37(c)(1) test, the
plaintiffs will not be prejudiced in having Dr. Muehrcke's new opinions stricken. As

CONCLUSION

For all of the foregoing reasons, Bard respectfully requests that the Court grants its Motion to Strike and preclude Dr. Muehrcke from offering any of the opinions contained in the “Bard Recovery Filter Specific Opinions” of his *Tinlin* Rule 26 Report at trial.

This 21st day of December 2018.

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mentioned previously, the plaintiffs have five other physician experts who can testify about generic issues concerning the Recovery Filter.